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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS,

Appellant,

against

The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,

Appellee.

NOTICE OF MOTION AND AFFIDAVIT.

WILLIAM M. PURDY,
Counsel for Appellant.

CORPORATE PRESS, INC., New York City

IN THE

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OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS,
Appellant,

against

The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Appellee.

TO FLORENCE J. SULLIVAN, Esq., *Counsel for Appellee:*

PLEASE TAKE NOTICE that upon the annexed affidavit of James E. Freehill, verified the 12th day of November, 1931, the transcript of the proceedings in the court below heretofore filed herein, the appellant in the above-entitled cause will move this court in the court room at the City of Washington, in the District of Columbia, for an order diminishing the record filed in the above-entitled cause by the exclusion of the following matter:

Testimony taken before the special commissioner on the assessment of damages printed at pages 133-296.

Exhibits received in evidence upon said hearings printed at pages 301-304.

Report of special commissioner, exceptions to said report and order confirming report printed at pages 312-326.

Exhibits received upon said hearings before the special commissioner, printed at pages 407-408; upon the ground that it is irrelevant and unnecessary to this appeal and that the printing of said matter will serve only to enhance the expense to the appellant.

PLEASE TAKE FURTHER NOTICE that the appellant will move for an order granting an extension of time until January of 1932 for the argument of this appeal for the reason that further time is needed for obtaining a decision on the motion to diminish the record and for the printing of the additional copies of the record on appeal, and for such other and further relief as to the court may seem fit and proper.

Such motion will be submitted in the United States Supreme Court at the time provided for it by the Rules of that court.

A printed copy of said motion and of the affidavit in support thereof is annexed hereto and herewith served upon you.

Dated, November 12, 1931.

WILLIAM M. PURDY,
Counsel for Appellant.

IN THE
SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.
No. 217.

WILLIAM STEVENS,
Appellant,
against
The Vessel "WHITE CITY," her engines, tackle, apparel, etc.,
Appellee.

State of New York, } ss.:
County of New York, }

JAMES E. FREEHILL, being duly sworn, deposes and says:

I am one of the counsel for the appellant and have been personally in charge of this matter since its inception, having tried the case in the United States District Court for the Southern District of New York, and have personally argued the appeal before the United States Circuit Court of Appeals for the Second Circuit, and am familiar with all the facts and proceedings.

This is a motion by the appellant for an order to diminish the record already on file in this court by excluding the testimony taken before the special commissioner in the court below on the assessment of damages and the exhibits received on said hearings, upon the ground that it is wholly irrelevant and unnecessary, and further upon the ground that the printing of said testimony and exhibits will greatly enhance the expense to the appellant. This wholly extraneous matter will tend to becloud the real questions involved, which concern only the liability of the appellee.

This is an action *in rem* commenced in the United States District Court for the Southern District of New York, by the filing of a libel and complaint against the vessel "White City" to recover damages sustained to a motor boat "Drfter," damaged during towage. An interlocutory decree was rendered by District Judge Woolsey in admiralty, and subsequently, the assessment of damages was referred to a special commissioner. The testimony taken before the special commissioner and the exhibits received in evidence consumes many pages in the record on appeal.

After the report of the special commissioner was filed and confirmed, a final decree was entered in favor of the appellant. An appeal was thereafter taken to the United States Circuit Court of Appeals for the Second Circuit by the appellee, which court reversed the decree and dismissed the libel.

The petition for writ of certiorari was granted by this court on or about October 22, 1931, and upon information and belief, it was ordered "that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ."

No point was made by the appellee in the United States Circuit Court of Appeals, either in the oral argument or on the brief that there was any error committed by the special commissioner in the assessment of damages, and it is clear from the opinion of the Circuit Court of Appeals that the reversal of the decree and the dismissal of the libel was based solely on the question of liability.

The opinion of the Circuit Court of Appeals states (p. 414):

> "We see no reason to question the conclusion that the hole was made during the trip, and we dispose of the case upon that assumption."

The court further stated at page 415:

"* * * if free to choose, we should follow the decision below."

Prior to the making of this motion, I requested counsel for the appellee to stipulate to omit the printing of the testimony taken before the special commissioner on the assessment of damages as well as the exhibits received upon said hearings, but this request was refused although I stated that if there was any particular part of said matter which he felt was vital to the appeal, there would be no objection to the printing of said portion.

The appellant on this appeal, will not touch upon any matter involved in the hearings before the special commissioner upon the assessment of damages and will rely solely on those points set forth in the petition and brief for writ of certiorari.

POINT I—A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee who is not present during the period when the damage to the tow takes place.

POINT II—Where a bailee for hire receives chattels in good condition and delivers the same in a damaged state, a *prima facie* case of negligence is made, which casts upon the bailee the burden of showing the circumstances surrounding the damage.

POINT III—Even assuming the correctness of the decisions of the Circuit Court of Appeals on the foregoing questions of law, the reversal was erroneous because there was ample proof of negligence on the part of the owners of the "White City" as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

If this motion is granted, there will be eliminated from the record, 182 pages and the record will be reduced from 442 pages to approximately 260 pages. If any useful purpose could be subserved by the inclusion of the proceedings before the special commissioner on the assessment of damages, there would be no objection to printing all of said matter.

The motion is made by appellant in entirely good faith in order that this court will not be burdened with a large record including much irrelevant matter, and to reduce the printing expenses to the appellant.

Although the appeal involves principles of law of great commercial importance on which there is much confusion in federal courts and among maritime lawyers, with respect to the rule of law to be adopted, the amount involved is extremely small.

Since the petition for writ of certiorari was granted by this court, the appellant has proceeded with due diligence, and it was only on November 2, 1931, that your deponent was informed by counsel for the appellee that the request to diminish the record would not be granted.

It is therefore, respectfully requested that the foregoing motion be granted and that the court order exclusion of the following matter from the record now on file:

Testimony taken before the special commissioner on the assessment of damages printed at pages 133-296.

Exhibits received in evidence upon said hearings printed at pages 301-304.

Report of special commissioner, exceptions to said report and order confirming report printed at pages 312-326.

Exhibits received upon said hearings before the special commissioner, printed at pages 407-408.

Since it will take a few weeks to obtain a decision on the motion to diminish the record and some further time will be necessary for the printing of the additional copies

of the record on appeal, it is respectfully requested that the court grant an extension of time to January, 1932, for the argument of said appeal.

Counsel for the respective parties have stipulated for an adjournment to January, 1932, and a copy of said stipulation is annexed hereto.

JAMES E. FREEHILL.

Sworn to before me this
12th day of November, 1931.

CORNELIA C. MULVIHILL,
Notary Public,
New York County.
N. Y. Co Clks. No. 329, Reg. No. 3M378.
Kings Co. Clks. No. 59, Reg. No. 3294.
Bronx Co. Clks. No. 22, Reg. No. 102M33.
Commission expires March 30, 1933.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1931.

No. 217.

WILLIAM STEVENS, *Appellant,* against The Vessel "WHITE CITY," her engines, tackle, apparel, etc., *Appellee.*	Stipulation to Continue.

IT IS HEREBY STIPULATED by and between counsel of record in the above-entitled cause, that this case may be continued until January session, 1932, of court, under the provisions of paragraph 1 of Rule 20.

Dated, New York, N. Y., November 4th, 1931.

NEIL P. CULLOM,
Attorney for Appellant.

FLORENCE J. SULLIVAN,
Attorney for Appellee.